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No. 1021

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IN THE

Supreme Court of the United States

EFRAIN SANTOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on November 13, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is reproduced herein as Petitioner's Appendix A.

JURISDICTION

The opinion and judgment of the Seventh Circuit Court of Appeals was filed and entered on November 13, 1967. A petition for rehearing was filed on November 28, 1967. The petition for rehearing was denied on December 1, 1967, a copy of said order is included herein as Petitioner's Appendix B. The jurisdiction of this Court is involved under Title 28 USC 1254.

QUESTIONS PRESENTED

1. Whether the opinion of the Court of Appeals is in conflict with decisions in other circuits.

2. Whether the opinion of the Court of Appeals deprives the petitioner of his constitutional rights to be confronted by the witnesses against him.

STATUTES INVOLVED

The statutes involved are 18 USC 371, 26 USC 4742(a), 26 USC 4744(a)(1). No question is raised as to the construction and interpretation of these statutes.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the Constitution of the United States of America and particularly that part which reads:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT

Petitioner was charged in five counts of a six count indictment with violation of Title 18 USC 371, 26 USC 4742(a) and 26 USC 4744(a)(1). Petitioner was charged with four others. Two of the defendants entered a plea of guilty to the conspiracy counts before trial commenced. Two other defendants withdrew their plea of not guilty and entered a plea of guilty to a conspiracy count at the conclusion of all the evidence. The cause was submitted to trial by jury on November 14, 1966, and the jury returned a verdict of guilty as to the petitioner on all five counts in which he was charged on November 15, 1966. On December 16, 1966, petitioner was sentenced to a term of imprisonment for five years.

The five counts against the petitioner charged him with four other defendants with unlawful transfer of marijuana on two different occasions and with conspiracy to commit the substantive offenses involved in the transfer of marijuana. Aside from the government chemist only two witnesses testified for the government, both of whom were treasury agents. One of the treasury agents was an undercover agent who participated in the sale and transfer of the marijuana. The other treasury agent was acting as a lookout or "cover" for the other agent and testified as to his movements and contacts with persons seen with the agent.

The crux of this appeal is based upon the admission into evidence over timely and repeated objections of a number of hearsay declarations of co-conspirators who were not on trial and did not testify. The hearsay declarations complained of were those attributed to the two defendants who entered a plea of guilty on the same day that the trial of the cause was commenced and who were, therefore, available to testify. The hearsay declarations involved are reproduced herein as Petitioner's Appendix C.

The proof in the case at bar centered about two purchases of marijuana made by Agent Coulter on April 16, 1966, and May 4, 1966. Coulter, through an informant, contacted the defendants Arroyo; they met in South Chicago and drove to East Chicago, Indiana, and were looking for the petitioner. After driving around for some length they observed petitioner in his automobile. One of the Arroyos emerged from the car, had a brief conversation with petitioner and followed him to a bar. The same defendant, Arroyo, again emerged from the car, had a brief conversation with petitioner, came back to the car and stated that petitioner told him he needed "$50.00 out front". The agent gave Arroyo the $50.00 who was then seen to approach petitioner with his hand extended; petitioner extended his hand and then put his hand in his pocket. About an hour and a half later the marijuana was delivered by the defendant Morales.

On May 4, 1966, Agent Coulter, the two Arroyos and the informant again went to East Chicago. Raymond Arroyo left, returned and the agent testified as to a conversation Arroyo had with petitioner about a purchase of marijuana. The agent gave Arroyo the money. Later on the agent saw the petitioner and Arroyo standing outside of the restaurant. Petitioner came into the restaurant and talked to the defendant DeJesus. DeJesus and petitioner left the restaurant and met Raymond Arroyo.

Later petitioner came back in the restaurant and said to Francisco Arroyo "Everything is ready, let's go". Petitioner left the restaurant and then was observed across the street from the car in which the agent, the informant and Francisco Arroyo were seated. Defendants DeJesus and Raymond Arroyo approached the automobile and DeJesus placed the bag of marijuana on the floorboard of the car, walked across the street and met petitioner. Petitioner and DeJesus then walked back to a building and entered it together. There was no testimony that petitioner ever touched, possessed or sold marijuana.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

This contention is urged in two respects: (1) A conflict in the Circuits as to the rule regarding the order of proof in conspiracy cases and (2) a conflict in the Circuits as to the quantum of proof required to show the existence of a conspiracy which would provide an evidentiary base for the admission of hearsay declarations of co-conspirators.

The rule in the Seventh Circuit as to the order of proof is that declarations of co-conspirators may be presented prior to conclusive establishment of the conspiracy without error so long as the conspiracy is established at some time during the course of the trial, *U. S.* v. *Clancy* (1960) 276 F. 2d 617.

The traditional rule followed by the Fifth, Sixth and Ninth Circuits is that the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all; that before one can be proven to be a conspirator and so bound by the admissions of a co-conspirator there must be some evidence of a conspiracy and his connection with the crime, *Nibbelink* v. *U. S.*, CCA 6 (1933), 66 F. 2d 178; *Panci* v. *U. S.*, CCA 9 (1957), 245 F. 2d 392; *Krulewitch* v. *U. S.*, (1949) 336 U.S. 440, 69 S. Ct. 716 (Concurring opinion of Justice Jackson).

The difficulty with the Clancy rule leads to the situation noted by Justice Jackson in *Krulewitch;* that is, that a conspiracy often is proved by evidence that is admissible only upon the assumption that a conspiracy exists.

The cautionary instruction given by the trial judge in the case at bar:

> "The Court: Ladies and gentlemen: As I have instructed you before, any statements by anyone other than the defendants here cannot at this time be considered as any evidence against these defendants, but is merely preliminary to show what the officer did or knew at a particular time. You will disregard any statement made by the defendants Arroyo about any of the defendants in this case at this time." (R. 102, l. 20—R. 103, l. 5

was meaningless since the party who made the hearsay declaration complained of was not on trial having already entered a plea of guilty to the conspiracy charge.

The hearsay declaration objected to was:

> "It was relative to him going to meet a person by the name of Frankie Santos (petitioner) to get the marijuana." . . .
>
> ". . . I had $300.00 to spend and I wanted it for a pound and a half of marijuana. When we got there he said he would go to see Santos, that they had got 80 pounds of marijuana . . ." (Appendix C)

It is to be noted that these declarations were admitted before there had been any contact with the petitioner; before the alleged conspiracy could conceivably have been formed. The petitioner was purportedly the source of the marijuana supply. He was the *sine qua non* to the existence of the conspiracy.

The declarations were attributed to a defendant not on trial and not subject to cross examination. If the defendant to whom the hearsay declarations were attributed was on trial a cautionary instruction to the jury that the declaration could only be considered as against that defendant making the declaration might have been proper. The defendant making the declaration not being on trial, the declaration was inadmissible for any purpose. There was no testimony at any time that petitioner had dealt with the hearsay declarants on any previous occasion, that the hearsay declarants had contacted the petitioner before meeting him on either of the nights in question or that petitioner knew the hearsay declarants or knew that they were going to contact him to purchase marijuana.

In short, the government was permitted by the admission of these declarations to establish the existence of the conspiracy and the petitioner's connection with it when there was not one scintilla of evidence aliunde the hearsay declaration to connect the petitioner with the transaction.

II.

The opinion of the Court of Appeals apparently resolves this difficulty by holding that there was sufficient proof aliunde the hearsay declarations of the conspiracy and the petitioner's connection with it to warrant the admission of the hearsay declarations. In so holding the Court of Appeals for the Seventh Circuit is sharply at variance with the decisions of the Court of Appeals for the Ninth Circuit and the Fifth Circuit as to the quantum of proof necessary to establish the existence of a conspiracy.

In *Ong Way Jong* v. *U. S.* (1957) 245 F. 2d 392, the evidence was as follows: A co-defendant had sold two ounces of heroin to a government agent. It was admitted

that defendant had no connection with this sale. Later the agent again contacted the co-defendant who claimed he had another source whom he described as an unemployed, ex-bookie and who was going to buy a new Cadillac, had no telephone and used to work in a cannery. This description fitted Ong. The co-defendant said he would contact his friend to procure the narcotics. Agents followed him to the defendant's residence and observed the co-defendant get into a 1951 Cadillac with the defendant Ong. They had a brief conversation. The co-defendant then drove to the apartment of the agent where he informed him that the price offered was too low. The co-defendant and Ong were observed together before the appointed hour in Ong's Cadillac. After a short conversation with the defendant the co-defendant want to a restaurant where he met the agent and told him he was still negotiating for delivery. The co-defendant was then followed to an intersection where he met Ong. There was a brief conversation and Ong left and was gone for about an hour. Later the co-defendant telephoned the agent and told him the delivery would be made in about an hour and that he was waiting for his connection to return with the heroin. About half an hour later the agents saw Ong return to the same intersection in his 1951 Cadillac. The co-defendant joined him. After a short meeting the co-defendant went directly to the apartment of the agent where he delivered heroin in return for $600. The co-defendant was then followed to the same intersection where he met Ong.

On this evidence the Court of Appeals for the Ninth Circuit reversed holding that it was insufficient to prove that Ong was engaged in any criminal activity. In reversing the court stated:

> "There is not scintilla of evidence that Ong was guilty of conspiring to sell narcotics. He is not shown to have touched, possessed, sold or conspired to sell narcotics . . . he was never found with an indicia of possible trading in narcotics or any evidence of the conspiracy in his possession." (id at p. 395)

In *Panci* v. *U. S.* (1958), 256 F. 2d 308, the evidence was as follows: The government agent saw the co-defendant and the defendant together, leave together, sit next to each other in a restaurant drinking coffee. While they were sitting at the counter the defendant withdrew his left hand from his pocket and passed a small brown paper bag behind his back to the co-defendant. They were observed leaving the restaurant together. Later the agent gave the co-defendant money for three ounces of heroin. The co-defendant was observed taking the heroin from a brown paper bag. On this state of the evidence the Court of Appeals held that it was insufficient to establish an evidentiary base to justify the admission of hearsay statements of the co-defendant and two other persons who were named as conspirators in the indictment but not charged. The Court of Appeals there noted that the government did not produce any witiness who testified that he had spoken to the defendant or heard him speak to anyone, that the defendant transferred heroin or had heroin in his possession or that the defendant was in possession of marked money used to purchase heroin or saw the defendant sell or deliver heroin to anyone.

In *Panci* some of the alleged co-conspirators testified and were at least subject to cross examination. In the case at bar the only testimony was that of the government agents who recited what the alleged co-conspirators purportedly told them.

Stripped of the hearsay declarations the only proof to show the petitioner's connection with the conspiracy on April 16, 1966, is that he had a conversation with the defendant Raymond Arroyo. Immediately after the conversation the agent gave Arroyo $50. Arroyo was then observed extending his hand to the petitioner, the petitioner was observed putting his hand in his pocket and petitioner went into a doorway and was not seen again at any time that evening. The marijuana was delivered by other persons approximately an hour and a half later.

The proof of the conspiracy, absent the hearsay declarations, on May 4, 1966, shows only that petitioner was in the vicinity and in the company of two of the defendants and that at one point he was heard to say upon entering the restaurant "Everything is ready let's go". The factual situation is squarely within the purview of the holding in *Ong Way Jong* (*supra*) where the court observed:

> "However all this does not prove Ong was dealing in narcotics. Of course there is a strong presumption that he was. But there is no proof. Unquestionably, someone supplied the illicit heroin which was purchased . . . before one can be proven to be a conspirator and so bound by the admissions of a co-conspirator . . . there must be some evidence produced of a conspiracy and his connection with the crime but no evidence has been adduced which definitely proves that Ong was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstances from which such an accessoryship could be legally inferred. Guilt by association would be the only basis . . ." (id at p. 394)

III.

THE OPINION OF THE COURT OF APPEALS DEPRIVES THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO BE CONFRONTED BY THE WITNESSES AGAINST HIM.

Finally petitioner contends that the conduct of the trial and the admission of the hearsay declarations deprive the petitioner of his constitutional right to be confronted with the witnesses against him as guaranteed by the Sixth Amendment. This is abundantly clear when the totality of the circumstances surrounding the trial are considered.

The only testimony presented by the government in the trial of the case concerning the two transactions on April 16, 1966, and on May 4, 1966, was that of the two treasury agents Coulter and Cruz. The government did not produce the informant who was present on both occasions nor did the government call as witnesses either of the defendants Arroyo who had immediately before the trial commenced entered a plea of guilty to the conspiracy counts.

The evidence which convicted the petitioner was not the result of what the agents heard or saw the petitioner do. The evidence which convicted the petitioner was the conversation the Arroyos related to the government agent.

No plausible reason has ever been advanced why the government did not or would not produce the defendants Arroyo as part of their case in chief where they could testify as to the purported conversations had with the petitioner. They were in court and had already entered a plea

of guilty so that they could not validly exercise the privilege against self-incrimination. They had already entered a plea of guilty to both conspiracy charges and were, therefore, subject to compelled testimony on the events in question.

In *Panci* v. *U. S.* (*supra*) some of the alleged co-conspirators testified and were subject to cross examination. The only witnesses subject to cross examination in the case at bar were two trained government agents who were merely reciting what the defendants Arroyo had purportedly related to them.

The procedure makes a mockery of the right of confrontation and reduces the right of cross examination to a meaningless fiction. It illustrates graphically the growing trend of government prosecutions utilizing the conspiracy concept to ensnare defendants on meager evidence which would be insufficient to establish guilt on the substantive charge. The government by this device is able to present evidence which any jury must regard as probative evidence of the petitioner's guilt through the lips of a trained government agent.

This Court should not blind itself to the realities of this situation. Quite obviously the defendants Arroyo had "plea bargained". By deliberately failing to produce the defendants Arroyo as witnesses after they had entered a plea of guilty the government avoided subjecting them to cross examination and impeachment. By this procedure the government was able to put before the jury the testimony of the defendants Arroyo without having their credibility impaired by cross examination.

In short, what the opinion of the Court of Appeals now condones is a ventriloquist theory of prosecution. The role of the government agent in the case at bar is analogous to that of a "summary witness" testifying before a grand jury in order to persuade the grand jury to return an indictment.

This Court has in two recent cases involving state prosecutions held that the Sixth Amendment's guarantee of the right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment, *Pointer* v. *Texas* (1965), 380 U.S. 400, 85 S.Ct. 1065; *Douglas* v. *Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074. It would indeed be anomalous for this Court to require state courts to conform to the standards set by the Sixth Amendment and to permit its lower courts to sanction and evade the constitutional guarantee by use of the specious conspiracy concept employed in the case at bar.

Particularly in point is the factual situation in Douglas where, in a prosecution for assault with intent to commit murder, the state called as a witness a co-defendant who had already been convicted for the same crime and refused, while acting in his own interest, to answer any questions in reliance on the privilege against self-incrimination. Under the guise of cross examination, after the witness had claimed the privilege, the prosecutor was permitted to read to the jury the witness' alleged confession which implicated the defendant. Significant is the statement in the majority opinion by Justice Brennan that:

> ". . . Loyd could not be cross examined on a statement imputed to but not admitted by him. Nor

was the opportunity to cross examine the law enforcement officers adequate to redress this denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, *cross examination of them as to its genuineness could not substitute for cross examination of Loyd to test the truth of the statement itself* . . .

Hence, effective confrontation of Loyd was possible only if Loyd affirmed the statement as his . . ." (At p. 1077 S.Ct. Report)

The witnesses against the petitioner in the case at bar were only nominally the treasury agents. Agent Coulter merely acted as a recording of what the defendants Arroyo purportedly said to him. Realistically the witnesses who testified against the petitioner were the defendants Arroyo. That testimony was outside the presence of the petitioner, was unsworn to and never subject to cross examination. As stated by Justice Black:

"It cannot seriously be doubted at this late date that the right of cross examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross examination in exposing falsehood and bringing out the truth in the trial of a criminal case,'" *Pointer* v. *Texas* (supra) (At p, 1068 S.Ct. Report)

CONCLUSION

The opinion of the Court of Appeals permits a conviction to stand on guilt by association. It sanctions a practice increasingly employed by the government in conspiracy prosecutions to convict on the basis of unsworn hearsay declarations. It permits the government to avoid direct evidence even when it is available and destroys the basic right of cross examination. State courts must adhere to the command of the Sixth Amendment. Federal courts are now at liberty to disregard that mandate.

The judgment should be reversed.

Respectfully submitted,

MAX COHEN
Attorney for Petitioner

PETITIONER'S APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 16207 SEPTEMBER TERM AND SESSION 1967

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EFRAIN SANTOS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

November 13, 1967

Before DUFFY, *Senior Circuit Judge*, CASTLE and FAIRCHILD, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* Defendant Santos was charged in five counts of a six-count indictment with violating federal laws pertaining to marihuana, 18 U.S.C. § 371, 26 U.S.C. § 4742(a), 26 U.S.C. § 4744(a)(1), 18 U.S.C. § 371 and 26 U.S.C. § 4742(a). Two of the counts charged a conspiracy with reference to events alleged to have occurred on April 16, 1966 and on May 4, 1966.

The principal claim of error relates to the admission into evidence of extra-judicial hearsay declarations made by other defendants not on trial and outside the presence of appellant, and, as defendant claims, before proof of

any conspiracy had been offered. It also is claimed by appellant that there was no independent proof of the alleged conspiracy absent the extra-judicial declarations of the co-defendants.

Two of the defendants charged with appellant, Francisco Arroyo and Raymond Arroyo, each entered a plea of guilty to the conspiracy counts before the trial commenced. At the conclusion of all of the evidence, two other defendants, DeJesus and Morales changed their pleas from not guilty to guilty as to the conspiracy count.

In order for such hearsay declarations, as here in question, to to be admissible for the purpose of proving a defendant guilty under a conspiracy count, certain conditions must be met: The declarations must be made during the existence of the conspiracy and they must be made in furtherance of the conspiracy. *Glasser* v. *United States* (1942), 315 U.S. 60, 74. Furthermore, there must be sufficient evidence aliunde extra-judicial declarations of co-conspirators establishing the existence of the conspiracy and connecting the appellant with it. The independent evidence establishing the existence of such a conspiracy may be direct evidence or circumstantial evidence. *United Stataes* v. *Iacullo* (7th Cir., 1955), 226 F.2d 788, cert. den. (1956) 350 U.S. 966; *Glasser* v. *United States, supra,* page 80.

The phraseology of the Supreme Court in the *Glasser* case appears at page 80 of the opinion: "... Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a co-location of circumstances.'" The Court then said: "... [T]he jury could infer the existence of a conspiracy and the participation of (the defendant) in it."

In the case at bar, the trial judge made a preliminary determination that the evidence, independent of the extra-judicial declarations complained of, was sufficient to make a *prima facie* showing of the existence of a conspiracy and of defendant Santos' connection therewith.

Bernard Coulter, a federal narcotics agent, negotiated on April 16, 1966, for the purchase of one and a half pounds of marihuana. The agent, the brothers Arroyo and the informer drove to East Chicago, Indiana, on April 16 in Coulter's automobile. Raymond Arroyo directed Coulter to park the car across the street from 3320 Michigan Avenue. Arriving there, Raymond Arroyo left the automobile and entered the Frontier Bar at 3320 Michigan Avenue. After a few minutes there, Arroyo returned to the car and stated Santos was at another bar. They then drove around the area and encountered Santos in an automobile. Arroyo got out of Coulter's automobile, walked over to Santos and talked with him. Arroyo then returned to the Coulter automobile which was again driven to 3320 Michigan Avenue. Coulter testified he saw Santos get out of his automobile and stand in front of the Frontier Bar where he was joined by Raymond Arroyo. They conversed briefly and Arroyo returned to the Coulter automobile saying that Santos wanted $50 "to get the deal to move." Coulter then handed $50 to Raymond Arroyo who walked directly across the street, extended his hand to Santos who also extended his hand. Santos then placed his hand in his pocket and entered the doorway immediately south of 3320 Michigan Avenue. Raymond Arroyo returned to the automobile and advised Coulter that Santos was sending someone after the marihuana. Raymond Arroyo had no money in his hands when he returned from conversing with Santos.

Coulter testified that about thirty minutes later, Raymond Arroyo came from the doorway to his automobile and advised him that the marihuana was there. Coulter handed Arroyo $250. Then defendant Morales exited the same doorway carrying a green shopping bag. He handed it to Raymond Arroyo and took the $250 and returned to the doorway. It was later determined that the bag contained marihuana.

Again, on May 4, Coulter and the Arroyo brothers returned to East Chicago and stopped near 3320 Michigan Avenue. Raymond Arroyo said he would "see if Santos had any marihuana." The others went to a nearby restaurant. Raymond went into the doorway hereinbefore described. He later returned to the restaurant, reporting that Santos had only one and a half pounds of marihuana left. Coulter agreed to and did pay $250 to Raymond Arroyo who departed from the restaurant and reentered the doorway. A short time later Santos and Raymond Arroyo came out of the doorway, and Santos entered the restaurant. He said to Francisco Arroyo in Spanish—"Everything is ready, get going." All but Santos left the restaurant and entered Coulter's automobile. Then, while Santos watched from across the street, Raymond Arroyo and DeJesus came from the direction of 3320 Michigan. DeJesus had a bag which he placed in Coulter's automobile. Santos and DeJesus walked back entering the doorway next to 3320 Michigan. An examination disclosed that the bag left in Coulter's car contained marihuana.

While it is apparent Santos endeavored to stay in the background, he was a close observor of and a partcipant in both transactions. It is clear that substantial evidence aliunde the declarations support the trial court's decision to allow the jury to consider these declarations in their deliberations.

We hold there was sufficient independent evidence to support the jury's decision as to the existence of a conspiracy on April 16 and another conspiracy on May 4, and that defendant Santos joined in and became a part of each conspiracy. "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States, supra,* p. 80.

The presence of Santos at the scene of each transaction and his participation in each transaction are sufficient evidence from which his possession and control of the marihuana might reasonably be inferred by the jury. As in *United States* v. *Gibson,* (2 Cir., 1962), 310 F.2d 79, 81, Santos was sufficiently associated with the persons having physical possession of the marihuana so that he was able to cause the marihuana to be produced for a customer. He had constructive possession of the narcotics. *Bass* v. *United States,* 326 F.2d 884 (8 Cir., 1964)

Even if the appellant had not joined the conspiracy until after the co-conspirators got to East Chicago, the conviction must be sustained. As this Court recently stated in *United States* v. *Hickey,* (7 Cir., 1966), 360 F.2d 127, 140, a defendant who joined "the conspiracy at a later date, took the conspiracy as he found it. When he joined and actively participated in it, he adopted the previous acts and declarations of his fellow conspirators. *United States* v. *Bucur* (7 Cir., 1952), 194 F.2d 297, 302. These acts became admissible against him, at least as they tended to show the nature and objectives of the conspiracy he joined."

We have considered other points raised by defendant Santos but find them to be without merit.

As we conclude there was no prejudicial error in the trial of this case, the judgment of conviction is

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

FRIDAY, DECEMBER 1, 1967

Before
Hon. F. RYAN DUFFY, SR., Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EFRAIN SANTOS, *Defendant-Appellant.* No. 16207	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

PETITIONER'S APPENDIX C

HEARSAY DECLARATIONS IN REGARD TO TRANSACTION OF APRIL 16, 1966

"'A. We had conversation relative to me purchasing marihuana from Raymond Arroyo. I asked him where he would be going, where we would have to go to get, and he said that we would have to go to East Chicago or Indiana Harbor. I told him I didn't know the way and he directed me the route to drive to that location.'' (R. 98, l. 20-R. 99, l. 2) . . .

"Q. Did you have a conversation with Raymond Arroyo at this time?

A. Yes, I did.

Q. Relative to what?

Mr. Cohen: Objection, leading and suggestive.

The Court: Overruled.

Mr. James: May we approach the bench?

The Court: The objection was overruled. You may proceed.

The Witness: A. (Continuing) It was relative to him going to meet a person by the name of Frankie Santos to get the marihuana.'' (R. 99, l. 19-R. 100, l. 8)

Timely objection was made and after a conference at the bench the court instructed the jury as follows:

"The Court: Ladies and gentlemen: As I have instructed you before, any statements made by anyone other than the defendants here cannot at this time be considered as any evidence against these defendants, but is merely preliminary to show what the officer did or knew at a particular time. You will disregard

any statement made by the defendants Arroyo about any of the defendants in this case at this time." (R. 102, l. 20-R. 103, l. 5)

Agent Coulter then testified:

". . . I had $300.00 to spend, and I wanted it for a pound and a half of marihuana. When we got there he said he would go to see Santos, that they had got 80 pounds of marihuana . . ." (R. 104, ll. 8-12)

Later when they arrived in East Chicago and they had observed Santos the agent was permitted to testify as to a conversation that Raymond Arroyo had with Santos as follows:

"Q. What was the conversation had with Arroyo?

A. Raymond Arroyo told me that Santos had to send someone after the marihuana, but he needed 'Fifty out front', meaning I had to give him $50.00 now to make the thing move, to otherwise make the transaction, a guarantee that I had the money." (R. 110, ll. 10-15) . . .

". . . Raymond Arroyo came back to the car and got in. He told me that Santos was sending somebody after the marihuana, that we should go have a cup of coffee a while, and come back." (R. 111, ll. 8-11)

After the marihuana was delivered by the co-defendant Morales, Agent Coulter testified:

"Q. This is Mr. Morales you are talking about, when you say 'him'?

A. Right. He was sitting in the front seat. Raymond Arroyo handed over the seat an amount of money, United States currency, and Morales placed it in his pocket. Then they had a conversation and they

began arguing about the marihuana. What I could pick up from the conversation, it was about, something about three. Raymond said, 'Just a minute, I have to go straighten it out with Santos'. He got out of the car and walked back to the same door that Morales came out of, and entered." (R. 116, ll. 4-15) . . .

"A. While Raymond Arroyo was gone, I asked Francisco what the difficulty was. He said the fact was that Santos misunderstood the order and sent three pounds of marihuana instead of the two that he ordered, because they had a mix-up on money prior to this in other dealings.

Mr. Cohen: I move that that be stricken on the same basis as heretofore noted.

The Court: Motion denied.

The Witness: A. (Continuing) About ten minutes later, at 10:45, Raymond Arroyo came out and he got in the car. I asked him what the problem was, I asked him if there was anything more than that and he said, 'This guy is always trying to mess me up on the money. He clearly understood the order and he sent three, but we have it all straightened out.'" (R. 117, ll. 6-22)

HEARSAY DECLARATIONS IN REGARD TO TRANSACTION OF MAY 4, 1966

"Q. What, if anything, happened when you arrived at this location?

A. Raymond stated he would go down to Santos' place and see if he had any marihuana. He told Francisco, Arnaldo and I to go into the Oriental Cafe across the street, on the corner, I believe, 3336—(Objection, Objection Overruled) . . .

A. I believe, yes. We had coffee, the three of us, Francisco, Arnaldo Reyes and I were in the Cafe and we stayed until about 8:20 P.M., when Raymond came back into the restaurant and called me aside, around to the other part of the counter.

He told me that Santos only had a pound and a half of marihuana left." (Objection, Objection Overruled)

. . .

"Q. Go on.

A. He stated that Santos only had a pound and a half of marihuana left, but would have more later on in the week. I told him I had $500.00, I wanted to get as much as I could. He said, "There is nothing I can do", he said if I wanted a pound and a half, all right, or did I want to wait until later on in the week, when I could get more for the $500.00.

I asked how much he wanted for the pound and a half and he said $275.00. I said it was too much, I would just as soon skip the deal as pay $275.00 for it. I told him I would give him $225.00 for the pound and a half, and he said all right, he would go and talk to Santos." (R. 126, l. 21-R. 128, l. 18)

[redacted]

[redacted]

No. [redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1967

EFRAIN SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1021

EFRAIN SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 385 F.2d 43.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1967. A petition for rehearing was denied on December 1, 1967. Mr. Justice Marshall extended the time for filing a petition for a writ of

certiorari to January 15, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether statements by co-conspirators were properly admitted against petitioner.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted on five counts of an indictment which charged unlawful conspiracies to transfer marijuana (two counts), illegal transfer of marijuana on two occasions, and failure to pay the required tax upon becoming a transferee of marijuana, all in violation of 18 U.S.C. 371, 26 U.S.C. 4742(a), and 26 U.S.C. 4744(a)(1). Four other persons were charged along with petitioner—two Arroyo brothers, Morales, and DeJesus. The two Arroyos entered pleas of guilty to a conspiracy count before petitioner's trial commenced. Morales and DeJesus went to trial with petitioner, but, shortly before the case was submitted to the jury, they changed their pleas to guilty on the conspiracy charge (R. 223). After the jury found petitioner guilty on all counts, he was sentenced to imprisonment for five years.

1. Two illegal transactions were involved. The government's evidence was presented largely through Narcotics Agent Coulter who recounted the events in chronological order. He testified that, with the aid of

an informant, he obtained an introduction to the Arroyo brothers in Chicago. On April 16, 1966, in an effort to purchase marijuana, Coulter, the informant, and the two Arroyo brothers drove to East Chicago, Indiana (R. 98). After their arrival, Coulter said he had $300 to spend for marijuana and Raymond Arroyo said that he would "go to see Santos", the petitioner, to get the marijuana (R. 100, 104).

Petitioner was located driving his Ford convertible (R. 106) and Raymond Arroyo spoke with him. After that conversation, the group followed petitioner's car to the immediate vicinity of the Frontier Bar (R. 107), where Raymond Arroyo again spoke to petitioner (R. 107), and then returned to the Coulter car. He said that petitioner had to send someone for the marijuana, but he needed $50 "out front" (R. 110)—*i.e.*, an earnest-money deposit. Coulter gave Raymond the $50 (R. 110). Coulter watched Raymond recross the street to where petitioner was standing. Raymond had the money in his hand. Raymond's hand met petitioner's and then petitioner placed his hand in his pocket (R. 110-111). Petitioner left, walked a few feet, and then entered a doorway south of the Frontier Bar. When Raymond returned to the Coulter car he no longer had the money in his hand (R. 112).

About thirty minutes later, Coulter saw Raymond go into the same doorway that petitioner had entered (R. 113). He came out with a man named Morales (R. 113). After some delay, Coulter gave an additional $250 to Raymond, then seated in the car

(R. 115). A few minutes later, Morales delivered a quantity of marijuana and, in turn, received money from Raymond (R. 116). After the delivery Raymond became angry that the quantity of marijuana delivered was in excess of the order (R. 116, 117). He told Coulter, "Just a minute, I have to go straighten it out with Santos" (R. 116). Raymond entered the same south doorway that petitioner had used and later expressed satisfaction as to the adjustment of his complaint (R. 117).

2. On May 4, 1966, Coulter and his group returned to the Frontier Bar area. Raymond said he would "go down to Santos' place" to see if he had any marijuana (R. 126). When Raymond returned, he told Coulter that petitioner had only 1½ pounds of marijuana left (R. 127). Coulter refused the offering price quoted to him, but offered a lesser sum. Raymond then said "he would go to talk with Santos" (R. 128). Raymond was again seen with petitioner coming out of the doorway south of the Frontier Bar (R. 192).

Approximately ten minutes after Raymond's departure, Coulter saw Raymond and petitioner talking outside the restaurant (R. 130). Petitioner entered, and greeted the second Arroyo brother and the informant. He then spoke to DeJesus, another patron in the restaurant (R. 130). Petitioner and DeJesus left together and met Raymond outside the cafe.

Fifteen minutes later, petitioner came back in and said in Spanish, "Everything is ready, get going"

(R. 131). Coulter went to his car. Petitioner stood and watched the Coulter car (R. 134). A short time later, DeJesus and Raymond Arroyo came to the car and DeJesus placed a brown bag containing marijuana in the car. Petitioner and DeJesus then walked off together (R. 134) and entered the same south doorway used on the previous visit (R. 135).

Another narcotics agent, Cruz, observed the scenes which have been described and corroborated the testimony of Coulter to the extent that he was physically able to do so from his somewhat more distant vantage point (R. 176-194).

ARGUMENT

Petitioner challenges the admission of agent Coulter's narration of what other participants had said to him or had told him petitioner had said to them. Although, admittedly, some of his testimony was hearsay, it is well established that declarations of a co-conspirator, made during and in furtherance of a conspiracy, are admissible against all who are shown, by independent evidence, to be members of the conspiracy. *Lutwak* v. *United States*, 344 U.S. 604, 607. Like other exceptions to the hearsay rule, this does not involve a denial of the constitutional right to confrontation of witnesses. The agent who heard the declaration testified; he was subject to cross-examination, and his credibility was tested. Moreover, while petitioner points out that since the Arroyo brothers had already entered guilty pleas they might

have been compelled to give direct testimony,[1] petitioner does not deny that these witnesses were equally accessible to him, if the accuracy of agent Coulter's testimony was suspect.

1. In order for declarations of a co-conspirator to be admissible against a defendant, there must be evidence independent of the declarations that the defendant was a member of the conspiracy. *Glasser* v. *United States*, 315 U.S. 60, 74. Here, as the court below found, there was ample independent evidence that petitioner was indeed a party to conspiracy to traffic in narcotics. He talked to Raymond Arroyo before Coulter gave Raymond the $50 deposit money; he evidently received this earnest money; he used the doorway from which the marijuana was later delivered on April 16. The concurrence of these facts constituted independent *prima facie* evidence of his status as a conspirator. Similarly, the circumstances of the second sale, including petitioner's talking with Raymond, his leaving with DeJesus, his direction to the others to "get going", and his observation of the delivery, also indicated his membership in the conspiracy. Thus Raymond's declarations as to what petitioner had told him during the negotiations for the sales were properly admissible against petitioner.

2. Petitioner also challenges the order of proof at trial, arguing that there was no proof of his participation in the conspiracy at the time Coulter was per-

[1] They had, however, entered guilty pleas to only one count of the indictment.

mitted to testify to Raymond's initial statements identifying petitioner as his source of supply and conveying petitioner's demand for earnest money. The order of proof in a conspiracy case is necessarily left to the discretion of the trial court. *Strauss* v. *United States*, 311 F.2d 926, 931 (C.A. 5), certiorari denied, 373 U.S. 910. So long as the evidence ultimately established a basis for admitting against petitioner the declarations by his co-conspirators, petitioner can point to no legal prejudice. In this case, where the principal witness was a participant in the events, it was clearly proper for him to be allowed to relate them in chronological order.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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